IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1009 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? YES.

3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge? NO.

MUSTUFAMIYA PIRSAHEDMIYA SAIYED

Versus

STATE OF GUJARAT

Appearance:

MR MM TIRMIZI for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/12/98

C.A.V.JUDGMENT :

1. In this writ petition under Article 226 of the Constitution of India, the prayer is made for quashing the externment order dated 7-9-98 and order of the appellate authority dated 13-10-98 passed against the petitioner under Section 56 of the Bombay Police Act, externing him from Ahmedabad City, Ahmedabad Rural, Gandhinagar, Kheda and Vadodara Districts for a period of two years.

2. The brief facts are that a show cause notice Annexure "C" to the writ petition under Section 59 of the Bombay Police Act was issued to the petitioner to show cause why he should not be externed for a period of two years from the aforesaid districts. Subjective satisfaction was arrived at by the Externing Authority on the basis of 3 criminal cases registered against the petitioner, the details of which are given in the show cause notice. Besides this, the Externing Authority also considered the statements of 7 witnesses recorded by the police. On the basis of these statements, the Externing Authority came to the conclusion that the petitioner was creating communal disturbances in the village and was causing hurts to the religious feelings of the two communities namely Hindus and Muslims and was also giving threats to managers of the religious institutions.

3. In response to the show cause notice the petitioner appeared and filed his defence. The externing authoirity after considering the material on record passed the impugned order Annexure "B" against the petitioner. Petitioner preferred an appeal which was dismissed by the appellate authority vide Annexure "A". It is therefore, this writ petition.

4. Learned counsel for the petitioner and the respondents were heard. The impugned orders of the externing authority and the appellate authority were challenged on several grounds.

5. The first contention has been that the show cause notice as well as the orders of the two authorities suffer from the vice of non-application of mind. Non-application of mind has to be scrutinized at two stages ; one at the stage of issuing show cause notice and the other at the stage of passing orders against the petitioner.

6. Coming to the show cause notice, the contention of the learned counsel for the petitioner has been that the offence at serial No.1 in the show cause notice namely C.R. No. 52/93 under Section 395 was shown to be

pending, but this case was tried and ultimately the petitioner was acquitted. The show cause notice was given to the petitioner on 30-5-98, whereas the petitioner was acquitted in the aforesaid case/crime at serial No. 1 on 23-5-97. In the impugned order the externing authority seems to have been influenced by the fact that it was not clear cut acquittal rather acquittal on the ground of benefit of doubt. However, acquittal is acquittal, whether such order was passed giving benefit of doubt to the accused or on finding that the prosecution failed in establishing beyond doubt the charge against the accused or that it was a case of no evidence. In either of these situations, the acquittal is to be considered as acquittal and it has not to be underestimated. It was not the case where the offence under section 395 of the Indian Penal Code against the petitioner resulted in acquittal few days or a week before the impugned notice was issued. On the other hand, practically for one year, it never came to the notice of the externing authority between 23-4-97 and 30-5-98 that the said case resulted in acquittal. Consequently, it is apparently clear from the record and the impugned order that incorrect mention has been made in the show cause notice that C.R. No.52/93 under Section 395 of IPC was pending against the petitioner. It is therefore, clear that show cause notice was mechanically issued without considering the relevant material that the aforesaid criminal case resulted in acquittal.

7. Another instance of non-application of mind while issuing show cause notice is exhibited from the fact that out of the remaining two offences mentioned in the grounds of detention, only one offence can be said to be punishable under Chapter XVI or XVII of the Indian Penal Code. Offence at serial No.3 is neither punishable under chapter XVI nor under chapter XVII of the Indian Penal Code. If the offence at serial No.3 is not punishable under these two chapters, its recital in the show cause notice will again expose non-application of mind by the externing authority. Then remains only one offence mentioned at serial NO.2 which was ccommitted in the year 1993. It was argued by the learned counsel for the petitioner that so far only investigation is going on in this offence and neither charge sheet has been submitted nor trial is pending. Thus, this offence has become stale and after about 5 years, the show cause notice on the basis of this offence could not have been issued which also exposes non-application of mind. Externment orders are passed considering the iminent requirement that the externee should be externed so that he may not

be able to continue his notorious and objectionable activities.

8. Another non-application of mind in the show cause notice is exposed from the concluding portion where the externing authority has mentioned that the petitioner should be externed from districts of Ahmedabad City, Ahmedabad Rural, Gandhinagar, Kheda and Vadodara. No reason has been given in the show cause notice why externment from these districts was proposed when the activities of the petitioner were confined only to the district of Ahmedabad Rural.

10. So far as the two orders are concerned, the same defects are to be found in the orders of the externing authority as well as the appellate authority. The order of externment was passed on several grounds, some of which are irrelevant. This court cannot decide which ground weighed with the externing authority and it cannot substitute is own decision over that of the externing authority and so the order of externment must be quashed. If one of the grounds mentioned in the externment order is unsustainable or non-existent and that other grounds still remain, it is quite unsafe to sustain the impugned order as it would amount to substituting an objective judicial test for subjective satisfaction of the Executive Authority which is against the legislative policy. The Division Bench pronouncement in Suresh Haribhai Marathi vs. Deputy Commissioner of Police, Surat City and another XXXII (1) G.L.R. 296 can be referred.

10. In Suleman Husa vs State of Gujarat and another 1989 (1) G.L.R. 101 also same view was taken where the externing authority did not apply its mind to a very relevant circumstance namely that the externee was acquitted in Crime Register No.58/86 and it was mentioned to the contrary that trial of the aforesaid C.R. No. was pending. On this ground the externment order was quashed. It was found that the order was passed in a mechanical way and this single omission was considered sufficient for quashing the externment order.

11. Bombay High Court also took similar view in Abdul Wahab v. Sub-Divisional Magistrate, 1992 Criminal Law Journal, 326.

Thus on these grounds the impugned order cannot be sustained. Even the appellate authority made no improvement over the defects contained in the order of the externing authority.

12. Another contention has been that neither in the show cause notice nor in the impugned orders it has been disclosed that the witnesses who gave confidential statements to the police expressed their apprehension that they had fear from the externee and on that ground they were not forthcoming to give statements against the petitioner and unless this was disclosed, the impugned orders will be rendered invalid. I do not find any substance in this argument. Two witnesses at serial No.6 and 7 have expressed such apprehension and fear in their minds from the petitioner and that fear was disclosed to the petitioner. The extracts of the statements of these witnesses were supplied to the petitioner and as such on this ground the impugned order cannot be quashed.

13. Another contention has been that the petitioner made a demand of certified copies of the sttements of witnesses who deposed against them before the externing authority, but that request was not accepted. For appreciating this contention, the order of rejection should have been filed on behalf of the petitioner, but that has not been done. Consequently, it cannot be said that application for certified copies of the statements of the witnesses was refused to be supplied by the externing authority. However, under the Bombay Police Act, there is no obligation on the part of the externing authority to give certified copies of the evidence of the witnesses examined and at the most the recording of evidence could be inspected on behalf of the petitioner. No application could be shown to me where any prayer was made for inspection of record of deposition of witnesses. Learned A.G.P. contended that firstly there was no application to supply certified copies of depositions and secondly since the petitioner was prolonging disposal of the case that his request was not accepted. Since the statements of witnesses were recorded in presence of the petitioner, it cannot be said that he was in any manner prejudiced. He could have inspected the record through his advocate or could have prepared the notes of the statements when the witnesses had been examined. Thus, this is not a ground for rendering the impugned orders invalid.

14. Another contention has been that at a late stage as many as 25 affidavits were filed but their copies were not supplied to the petitioner and that these affidavits were not disclosed in the show cause notice. There is nothing on record to show that these 25 witnesses were before the externing authority when the show cause notice was issued. As such, these affidavits could not be

disclosed in the show cause notice, but it appears that these affidavits were taken in the court at the time of recording evidence and as such it was obligatory on the part of the externing authority to furnish its copies to the petitioner so that he might had been able to adduce evidence orally or in the nature of counter affidavit to rebut these 25 affidavits. Since this was not done, the impugned order of the authority is vitiated for violation of principles of natural justice and for not affording the petitioner reasonable opportunity of hearing in his defence and this has also rendered the impugned order of the externing authority invalid. As a consequence thereof, the order of appellate authority which has confirmed such order will also be rendered invalid.

15. Another ground of attack has been that the externing authority has relied upon extrenous matter which was not shown in the show cause notice. This is nothing but repetition of the earlier grounds namely affidavits of 25 witnesses subsequently relied upon by the externing authority which were neither disclosed in the show cause notice nor their copies were furnished to the petitioner. As stated earlier, these affidavits could not be disclosed in the show cause notice because they were not before the externing authority. However, these affidavits should not have been relied upon by the externing authority in the impugned order because that would amount to placing reliance upon evidence and material which was beyond the material disclosed in the show cause notice. This defect has also rendered the impugned order of the externing authority invalid. He should have confined himself to the material disclosed in the show cause notice and on the basis of that material, externment order should have been passed. Additional material could not have been collected or permitted to be adduced in the course of hearing without affording an opportunity of rebuttal to the petitioner. Thus, on this ground also the impugned orders deserve to be quashed.

16. Another contention has been that no reason has been given either in the show cause notice or in the impugned orders of the externing authority or the appellate authority why the petitioner was externed from somany districts mentioned above whereas he is resident of district Ahmedabad (Rural) only. This argument has also substance and it discloses non-application of mind by the appellate authority as well as by the externing authority for externing the petitioner from five districts mentioned aforesaid. Wheneven an externing authority chooses to direct externment from not only the district within which the person against whom the order

is passed is seen to be active, but also from contiguous districts, the reason why such externment order should operate even in regard to such contiguous districts should be shown in the notice preceding the order as well as in the order. It must be so, for if a person confined his activities to a particular district there would be no justification to extern him not only from that district, but from the adjoining district also unless it is shown that circumstances warrant such a course. If there is such lacuna in the show cause notice as well as in the impugned order, it is not for the court to fill up lacuna in the material noticed by the externing authority by assuming that there must be some reason for externing from contiguous district also. That must be indicated by the externing authority. For this full bench decision in Sandhi Mamad Kala v. State of Gujarat 14 G.L.R. 384 and Saiyad Husen Saiyad Umar vs. State of Gujarat,1985 (2) G.L.R. 1045 can be referred.

17. The externing authority under Section 56 of the Bombay Police Act has power to remove or extern a person not only from the district within which the externing authority has jurisdiction, but also from the districts contiguous to his own district. The criteria for passing such an order is provided for in Section 56 and there must be some indication in the order itself of the existence of circumstances which would lead to the satisfaction of the authority that it was necessary not only to extern a person from his own district but also from the contiguous district. Such circumstances must be qua every area or region from which a person is directed to be externed and there must be some material or indication of such material in the order. The case of Vrajlal Mohanlal v. District Magistrate, Rajkot and another, reported in 3 G.L.R. 807 can be referred on the point.

18. Coming to the facts of the case in the writ petition under consideration, there is no mention either in the show cause notice or in the impugned order why it was necessary to extern the petitioner from above five districts. This lacuna cannot be filled up by this Court on the strength of arguments of the learned A.G.P. that the petitioner could operate even from thoe districts to create communal disturbances in the district of Ahmedabad (Rural). However, if this indication could have been given in the show cause notice or the impugned order, the contention of the learned A.G.P. could have been accepted, but not otherwise. It was open to the externing authority to mention in the show cause notice that from these adjoining districts the petitioner with

the help of his companions could have created communal disturbances in the district of Ahmedabad Rural, but no such indication is to be found nor any material is found for this inference. An inference cannot be based upon mere conjectures. There must be some material to form an opinion and in the absence of material, no opinion can be formed that the petitioner by shifting his head-quarter to the remaining four districts could have created communal disturbances in the district of Ahmedabad Rural. Thus, on this ground also the impugned orders are rendered invalid and illegal.

19. It was also contended that application was given for supplying copies of affidavits of 25 witnesses filed subsequently during inquiry which was rejected and this has prevented the petitioner from furnishing effective representation and defence. This point has already been discussed in the foregoing portion of this judgment. Suffice it to say that in view of the observations made earlier, if these affidavits could not safely be admitted and read in evidence by the externing authority, non-supply of copies of such affidavits cannot be said to have rendered the impugned orders invalid.

20. Learned A.G.P. contended that on the facts and circumstances of the case, the writ petition is liable to be dismissed because there is enough material against the petitioner that he was inciting communal disturbances with sole purpose of getting usurped the thrown of the religious institutions to the persons of his community. Sincerity or purpose however is not a ground for upholding the externment order. When an order of externment is passed, it has to be decided on the touch stone of constitutional guarantees provided to the externee and also to the ordinary laws of procedure. If the orders are violative of principles of natural justice and also suffer from vice of non-application of mind and further prevented the petitioner from submitting effective representantion and defence, the orders cannot be sustained. Since the impugned orders do not stand the scrutiny on the touch stone of legality, the same cannot be sustained.

21. For the reasons given above, the impugned orders are liable to be quashed. The result, therefore, is that the writ petition has to be allowed and is hereby allowed. The impugned orders dated 7-9-98, Annexure "B" and order dated 13-10-98, Annexure "A" to the writ petition are hereby quashed.

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mithabhai